its statutory duty, and therefore, even if the council's officers while acting in the apparent scope of their authority had purported to determine the plaintiffs' planning application in advance, that was not binding on the council because it alone had power under the Town and Country Planning Act, 1971 to determine the applications. Dismissing the firm's claim, the court held that there were only two kinds of exception to the principle that a public authority could not be estopped from exercising its duties and powers. One exception was where it had statutory power to delegate functions to its officers and there were special circumstances to justify the applicant in thinking that the officer thus had power to bind the authority by an irrevocable decision, and the other exception is where the authority waives a procedural requirement relating to some application made to it, whereupon it may be estopped from relying on the lack of formality. Neither of these exceptions apply to the proceedings before us, and in the light of the statutory provisions we have referred to and the authorities we have discussed it would appear that the equity sought to be raised by the respondents would establish against the State Authority rights in respect of State land which it is prevented by statute from creating other than in the prescribed manner.

The application of the doctrine of equitable estoppel and the injection of equity in the circumstances was misconceived and the learned Judge's conclusion on this issue cannot therefore be sustained. The respondents' claim on the primary issue must therefore fail. We accordingly allow this appeal with costs here and in the court below, set aside the order of the learned Judge and dismiss the respondents' claims for relief in their action. The deposit lodged in court by way of security will be refunded to the appellants.

Appeal allowed.

Solicitors: *Yazid Baba & Partners; Gunaretnam & Co.*

ONG AH MAI v. LING POOI MING

[O.C.J. (George J.) May 6, 1983]
[Kuala Lumpur – Originating Summons No. 155 of 1979]

Practice & Procedure – Custody and maintenance – Consent Order – Divorce proceedings not pending – Whether court had jurisdiction to grant ancillary relief before decree nisi – Law Reform (Marriage & Divorce) Act 1976, ss. 47, 52 & 82 – Married Women and Children (Maintenance) Ordinance 1950 – Courts of Judicature Act 1964, s. 24(d).

Jurisdiction – Custody and maintenance applications – Court had no jurisdiction to make orders pertaining to division of family property or for parties to file divorce proceedings before decree nisi.

Family Law – Custody and maintenance applications – When court can make orders pertaining to division of family property or for parties to file divorce proceedings.

On March 9, 1979 the applicant on her behalf and on behalf of two of her children took out Originating Summons No. 155/79 in which her husband, the father of her two said children, was the respondent. The application was for, *inter alia*, custody of the two children and for maintenance for the wife and the said children. Divorce proceedings were not pending. The learned Judge made a consent order.

The applicant sought to set aside the consent order or at least items (iii) and (viii) thereof on the ground that the court had no jurisdiction to make the order. The wife also asked the court to direct that the question of division of matrimonial property may be resolved by the parties in divorce proceedings.

Items (i) and (ii) of the order of April 19, 1982 dealt with maintenance to be paid by the husband. By item (iii), the husband was to transfer certain immovable property to the wife. Items (iv), (v), (vi) and (vii) dealt with the custody of and access to the children of the marriage. By item (viii), the husband and the wife were by consent ordered to file a "mutual consent divorce petition" under section 82 of the Law (Marriage and Divorce) Act 1976. Item (ix) dealt with medical and dental expenses of the children and with their education. Item (x) dealt with costs of the proceedings and item (xi) had the effect of vacating all previous orders made in the matter.

The issue before the court was whether the Judge who made the consent order had the jurisdiction to do so.

Held: (1) the proper place and time to consider the weight to be given to the agreement between the parties that resulted in the making of the consent order is the court sitting in its divorce jurisdiction hearing an application for ancillary relief after a decree *nisi* dissolving the marriage has been made;

(2) the jurisdiction of the learned Judge who made the consent order was not that of a judge hearing an application for ancillary relief after a decree of dissolution of marriage but that conferred on him by section 24(d) of the Courts of Judicature Act 1964 and the Married Women and Children Maintenance Ordinance 1950, the former

dealing with the custody of the children and the latter with periodical payments by way of the maintenance for the wife and children. These provisions of the law do not confer on the court jurisdiction to make orders pertaining to the division of family property or for the parties to file divorce proceedings;

(3) items (iii) and (viii) of the Consent Order of April 19, 1982 should be set aside;

(4) it is open to both parties to raise issues relevant to ancillary relief if and when a dissolution of the marriage is pronounced at which stage the terms of the agreement arrived at between the parties will be relevant and the court will have to consider what, if any, weight should be given to its terms.

Cases referred to:

(1) *Minton* v. *Minton* [1979] 1 All E.R. 79.
(2) *Edgar* v. *Edgar* [1980] 3 All E.R. 887.
(3) *Bennett* v. *Bennett* [1952] 1 K.B. 249.

ORIGINATING SUMMONS.

Miss Chan Swee Yoke for the applicant.
R.T.S. Khoo for the respondent.

Cur.Adv. Vult.

George J.: On March 9, 1979 Ong Ah Mai on her behalf and on behalf of two of her children took out the Originating Summons No. 155/79 in which her husband, father of her two said children was the Respondent. The application was for, *inter alia,* custody of the two children and for maintenance for the wife and the said children. Divorce proceedings were not pending.

Various related interlocutory matters came on for hearing from time to time and various interim orders were made. Eventually the main application came on for hearing on April 19, 1982 with Encik Jagjit Singh as Counsel for the Applicants and Encik R.T.S. Khoo for the Respondent. Apparently there had been attempts made for the parties to arrive at a settlement to enable the court to make a consent order on the application and on April 19, 1982 the court was informed that the parties had arrived at a settlement and the court was required to enter a consent order. This was done in the presence of the parties and their respective solicitors. Encik Jagjit Singh in his affidavit of January 12, 1983 (enclosure 44) states that after the terms of the consent order were reported to the Judge he (the judge) read it to the parties and the Chinese Court Interpreter interpreted the terms as read out by the Judge for the benefit of the Applicant Ong Ah Mai and that it was only after she had agreed to the terms in Open Court that the Judge made the consent order. This contention by Encik Jagjit Singh is not denied.

I took the application by the wife (enclosure 43) first and at the end of the hearing reserved judgement and adjourned the application (enclosure 40) to a date to be fixed.

By her application the wife seeks to set aside the consent order or at least items (iii) and (viii) thereof on the ground that the court had no jurisdiction to make the order. The wife also asks the court to direct that the question of division of matrimonial property may be resolved by the parties in divorce proceedings.

Items (i) and (ii) of the order of April 19, 1982 dealt with maintenance to be paid by the husband. By item (iii) the husband was to transfer certain immovable property to the wife. Items (iv), (v), (vi) and (vi) dealt with the custody of and access to the children of the marriage. By item (viii) the husband and the wife were by consent ordered to file a "mutual consent divorce petition" under section 82 of the Law Reform (Marriage and Divorce) Act. Item (ix) dealt with medical and dental expenses of the children and with their education. Item (x) dealt with costs of the proceedings and item (xi) had the effect of vacating all previous orders made in the matter.

While on the face of the summons the ground relied on is that the court that made the consent order had no jurisdiction to do so, before me Miss Chew Swee Yoke, counsel for the wife submitted as a second ground that the wife had not understood the effect of the terms of the consent order and that in any event she had not been advised as to her rights before or when the order was made.

I see no merits in the second ground. The wife in her affidavit in support of the application goes further than Miss Chew and says that she consented to the terms of the order under duress applied on her by her then counsel Encik Jagjit Singh who had apparently told her that her husband had sold or mortgaged most of the properties and that if she did not agree to the terms of the consent order she would end up getting nothing.

The letter of April 12, 1982 written by M/s Jagjit Singh & Co. to the husband's solicitors (exhibit JS-1 to Encik Jagjit Singh's affidavit) a copy of which apparently was sent to the wife

("c.c. Client"), to some extent, is inconsistent with the wife's contention that Encik Jagjit Singh had told her that the husband had sold or mortgaged all his properties. The wife's affidavit and that of her friend Look Siew Ken and particularly the undated letter by the wife to M/s Jagjit Singh & Co. exhibited as JS-3 to Encik Jagjit Singh's affidavit suggest to me without any uncertainty that the wife was far from being an ignorant housewife who could be manipulated by her legal advisers. The impression I have is that she knew exactly what she wanted – one has only to read her letter, the said exhibit JS-3 to see that.

Her affidavit of December 13, 1982 shows that to get her way she is prepared to deviate from the truth. To my mind what she stated in paragraph 4 of that affidavit "... But when I received the Draft Consent Order I asked a lawyer friend to explain it to me and I was surprised to hear that I was supposed to sign a mutual consent divorce petition" is quite inconsistent with her reference to that part of the order in her letter JS-3. "..... Also the draft order condition (viii) must be changed. I can only agree to file a mutual consent Divorce Petition if I am secured of the house and my maintenance."

If she was prepared to dot the "i"s and cross the "t"s and went to the extent of writing that letter JS-3 for that purpose I have no doubt that she would have taken issue with her solicitors had she been in fact surprised to learn that the consent order included the term that the parties would file the joint petition.

On the evidence before me I find as a fact that the terms of the consent order were read and explained to her prior to the order being made, she had agreed to each of the terms contained in the consent order and that she knew the effect thereof. To my mind she is now having second thoughts about what she should have consented to, which is not a ground for setting aside the order. The serious allegations made against Encik Jagjit Singh are without any basis whatsoever.

Section 52 of the Law Reform (Marriage & Divorce) Act 1976 provides that if a husband and wife mutually agree that their marriage should be dissolved "they may ..... present a joint petition accordingly and the court may ..... dissolve such marriage on being satisfied that both parties freely consent and that proper provision is made for the wife and for ... the children ..."

A condition precedent to the presentation of a joint petition is a mutual agreement and the court will only dissolve the marriage upon being satisfied that proper provision is made for the wife and for the children. The section calls for such an agreement. But it is for the court to decide whether the provisions the parties had agreed to are proper at the hearing of the joint petition.

Now although the proceedings before the court was for the custody of the children and for maintenance under the Married Women and Children (Maintenance) Ordinance 1950 the agreement arrived at went beyond that and amounted to the condition precedent to the filing of a joint petition in that it included what could be a division of property and the agreement to file the joint petition. As an agreement between the parties I see nothing wrong with it. With the coming into force of the Law Reform (Marriage & Divorce) Act 1976 we can say with Lord Scarman in *Minton* v. *Minton*[1] that the law now encourages spouses to avoid the bitterness after family breakdown and to settle their money and property. The law encourages what has come to be known as a "clean break". The agreement arrived at between the parties is in keeping with section 52 of the Act. But it will be open to the court that eventually disposes of any petition for dissolution of the marriage to satisfy itself whether the provisions made, in the agreement, for the wife and children, are proper.

Section 47 of the Act makes the principles on which matrimonial relief is given in England relevant when issues pertaining to matrimonial relief are considered in our courts. As a result the *ratio decidendi* in *Edgar* v. *Edgar*[2] provides a useful guide to the problems that have surfaced at this stage in the dispute between the parties. In that case the parties had entered into a deed of separation under which the husband agreed to purchase a house for the wife and to confer other capital benefits on her and also to pay her £1600 per annum less tax and to make periodical payments for the children in the custody of the wife. The wife agreed that if she obtained a divorce she would not claim a lump sum (there is provision to do so in the English law) or property transfers orders. The husband fully carried out his obligations under the deed. Sometime thereafter the wife applied for, *inter alia*, a lump sum payment. The husband contended that the court was required to give effect to the wife's agreement in the deed not to apply after divorce for additional capital provisions and should refuse the application for the lump sum payment.

In his judgment Ormrod L.J. was of the view that the court should approach the situation where there was a prior agreement between the parties by deciding what weight should be given to it. He said (at page 893 b. 3):

"To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue."

Now Ormrod L.J. was applying section 25(1) of the Matrimonial Causes Act 1973. Our Act does not have a section *in pari materia* with the English section but in my view Part VII of our Act read together with section 47 thereof calls, on the facts of the instant case, for the application of the approach taken by Ormrod L.J.

However, the proper place and time to consider the weight to be given to the agreement between the parties that resulted in the making of the consent order is the court sitting in its divorce jurisdiction hearing an application for ancillary relief after a decree *nisi* dissolving the marriage has been made.

Be that as it may the issue before me is whether the Judge who made the consent order had the jurisdiction to do so (I have already dealt with the duress aspect of the matter and with Miss Chew Swee Yoke's second ground). In effect the parties reported to the Judge hearing the application for custody of the children and maintenance of his wife and children that he need not adjudicate on the issues in that the parties had agreed to present a joint petition having mutually agreed that their marriage should be dissolved and that they had also agreed on the provisions to be made *pendente lite* and in respect of relief ancillary to the dissolution of the marriage. The parties had agreed on the terms for a clean break.

In my judgment with the greatest respect to the Judge who obviously was prevailed upon to make the consent order, his jurisdiction was not that of a judge hearing an application for ancillary relief after a decree of dissolution of marriage but that conferred on him by section 24(d) of the Courts of Judicature Act 1964 and the Married Women & Children (Maintenance) Ordinance 1950, the former dealing with the custody of the children and the latter with periodical payments by way of the maintenance for the wife and children. These provisions of the law do not confer on the court jurisdiction to make orders pertaining to the division of family property or for the parties to file divorce proceedings.

Miss Chew Swee Yoke has drawn my attention to *Bennett* v. *Bennett*[3] which, let it be noted, has to be read without forgetting that that judgment was delivered before the reforms into the law of divorce were brought into force. However, what Denning L.J. said at the bottom of page 262 continues to obtain

"If the parties do not oust the jurisdiction of the Divorce Court, but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid. The court, however, cannot and will not give its sanction before decree nisi. It has itself no jurisdiction before decree *nisi* to deal with permanent maintenance. Its jurisdiction only arises on the decree."

But Lord Denning's views expressed in respect of the effect of the private agreement between the parties (top of page 262) are out of date in view of the modern law i.e. The Matrimonial Causes Act 1973 in England and our Act of 1976. As far as that view is concerned, *Edgar* v. *Edgar* supersedes *Bennett* v. *Bennett*.

Accordingly, in my judgment items (iii) and (viii) of the Consent Order of April 19, 1982 should be set aside and I so order.

As to the prayer that directions be given to the effect that the question of division of matrimonial property be resolved at the hearing of the divorce proceedings, I will not be prevailed upon to do so. I will not be moved into giving directions that are in the context of the application before me outside my jurisdiction.

In any event, in the face of this judgment such

a direction will be unnecessary. The effect of my judgment is that it is open to both parties to raise issues relevant to ancillary relief if and when a dissolution of the marriage is pronounced at which stage the terms of the agreement arrived at between the parties will be relevant and the court will have to consider what if any weight should be given to its terms.

Since the order that is the subject of this application was a consent order to which the wife was a consenting party and in view of the fact that one of the two grounds in support of the application has been found to be without merit I order that each party bear its own costs of and incidental to the application.

Order accordingly.

Solicitors: *Chai Chew & Co.; Shearn Delamore & Co.*

JOGINDER SINGH v. PUBLIC PROSECUTOR

[A.Cr. J. (Ajaib Singh J.) July 8, 1983]
[Ipoh – Perak Criminal Appeal No. 186 of 1982]

Criminal Law & Procedure – Charge of falsely causing institution of criminal proceedings in respect of dangerous drugs against four persons – Accused sentenced to 2 years' imprisonment – Appeal – Whether trial in Sessions Court a nullity for want of sanction of Public Prosecutor as required under Criminal Procedure Code (F.M.S. Cap. 6), s. 129(i)(b) – Penal Code (F.M.S. Cap. 45), s.211 – Criminal Procedure Code (S.S.Cap.21) (repealed), ss.39. 306(3) & 448 – Criminal Procedure Code (F.M.S. Cap. 6), ss.129(i)(b) & 422 – Criminal Procedure Code 1898 (India), ss. 195 & 537.

Judicial Precedent – Decision of court of 3 judges empanelled under s.306(3), Criminal Procedure Code (S.S. Cap. 21) not binding on High Court of co-ordinate jurisdiction.

The appellant in this case was charged in the Sessions Court under section 211 of the Penal Code with falsely causing the institution of criminal proceedings in respect of dangerous drugs against four persons. The appellant pleaded guilty and was sentenced to 2 years' imprisonment and he appealed against the sentence.

At the outset of the hearing of the appeal counsel for the appellant raised for the first time a preliminary point that the trial in the Sessions Court was a nullity because it had proceeded without a sanction of the Public Prosecutor as required under section 129 (i)(b) of the Criminal Code (F.M.S. Cap.6).

Held: (1) by virtue of the provisions of section 422 of the Criminal Procedure Code, the conviction of the appellant in the Sessions Court should not be set aside unless it can be shown that the want of sanction has occasioned a failure of justice. In this case there was not the slightest suggestion whatsoever that the want of sanction had occasioned a failure of justice;

(2) on an appeal on sentence from the subordinate courts the High Court will not interfere with the sentence imposed unless it can be shown to its satisfaction that in the circumstances of the particular case the sentence was manifestly excessive or inadequate or that in fixing the sentence the subordinate court had failed to adequately consider all relevant factors either for or against the offender;

(3) there were no merits in this appeal and no extenuating circumstances whatsoever which can be taken in favour of the appellant. The learned President of the Sessions Court considered the case very carefully from every angle and having done so he quite rightly took a serious view and imposed the maximum of 2 years. There was therefore no reason to interfere with the sentence and the appeal should be dismissed.

Per Curiam: "In the case of *Hassan bin Isahak*(2) the court had expressed its opinion that section 448(b) of the Criminal Procedure Code (S.S. Cap.21) should be repealed as was done in India in 1923 when the equivalent of this provision in the Indian Criminal Procedure Code of 1898 was repealed by Act XVIII ... speaking for myself I would say that there is no valid reason why there should be any repeal as suggested in the case of *Hassan bin Isahak.* Justice is well served by section 422 of the Criminal Procedure Code (F.M.S. Cap. 6) for it enables a superior court sitting in appeal or in revision to remedy technical defects, which may have inadvertently arisen in a trial "defects which ought not to be made the means of culprits escaping the just penalties of their crimes".

Cases referred to:

(1) *Emperor* v. *Johri* A.I.R. 1931 All. 269.
(2) *Hassan bin Isahak* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 179.
(3) *Muthu Moopan & Anor.* v. *Rex* I.L.R 1937 Mad 664.
(4) *Pitchaykutty* v. *Public Prosecutor* [1961] M.L.J. 293.
(5) *Sunder Dasadh* v. *Mahto & Ors.* (1901) I.L.R. Cal 217.
(6) *Perumalla Nayudu* v. *Emperor* (1908) I.L.R. 21 Mad. 80.
(7) *Emperor* v. *Tribhovandas Brijbhukandas* (1902) 26 Bom. 533, 537.
(8) *Bhajja* v. *Emperor* A.I.R. 1939 All 238, 240.
(9) *Salleh & Anor.* v. *Rex* 10 S.S.L.R. 27.

CRIMINAL APPEAL.

Karpal Singh (*Gurbachan Singh* with him) for the appellant.

Miss Tee Hong Geok (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.